

**Consideration of draft Findings of Fact and Conclusions of Law
with Final Order following remand by the AOPA Committee in
Holland v. Phillips, et al., Administrative Cause No. 14-056W**

- Findings of Fact and Conclusions of Law with Final Order (Draft)
- Findings of Fact and Conclusions of Law with Modified Final Order (Draft revisions incorporated)

Kathleen S. Holland, (*collectively referred to as "the Claimants"*) on March 17, 2014 seeking resolution of a dispute "concerning the location of their pier on an easement owned by them" that fronts on Dallas Lake, located in LaGrange County, Indiana.

2. The dispute arose as a result of a demand made by the Respondent's, Mark Phillips, Sara Phillips and Lisa Meiners (*collectively referred to as "the Respondents"*), that the Claimants remove their pier as well as any boat lift or boat moored to the pier.
3. Dallas Lake is a public freshwater lake. *Indiana Code § 14-8-2-222, Indiana Code § 14-26-2-3, Information Bulletin #61 (Fourth Amendment), "Listing of Public Freshwater Lakes", <http://www.in.gov/legislative/iac/20140924-IR-312140381NRA.xml.pdf>.*
4. A prehearing conference was scheduled for April 11, 2014 but upon motion of the Respondents was continued and conducted on May 14, 2014. The Claimants appeared in person and by counsel, Stephen R. Snyder. The Respondents appeared by counsel, William W. Goodin, with individual Respondents, Mark Phillips and Lisa Meiners, also appearing in person. The Indiana Department of Natural Resources ("*Department*") also appeared by counsel, Andrew J. Wells. The parties were each represented by counsel throughout the pendency of this proceeding, although on July 12, 2014, counsel, Joy M. Grow, entered her appearance as substitute counsel for the Department.
5. The Department filed a Petition to Intervene in the instant proceeding on April 1, 2014, which was granted on May 14, 2014 during the prehearing conference. The Department was identified as the "Agency Respondent".
6. Also on May 14, 2014 during the prehearing conference, the Respondents filed their counterclaim for relief.
7. During the prehearing conference the parties agreed that an opportunity to file summary judgment motions should be scheduled in the event any party wished to file such motion but further sought to have a final administrative hearing scheduled. No summary judgment motion was filed by any party. Witness and exhibit lists were timely filed and the parties participated in a final status conference as originally scheduled prior to conducting the administrative hearing.
8. The administrative hearing was conducted on November 21, 2014.
9. Following the conclusion of the administrative hearing the parties sought an opportunity to file post hearing briefs by December 22, 2014.

10. The instant proceeding was initiated under the authority 312 IAC 11-1-3(a), which specifies that, “a riparian owner or the department may initiate a proceeding under IC 4-21.5 and 312 IAC 3-1 to seek resolution by the Commission of a dispute among riparian owners, or between a riparian owner and the department, concerning the usage of an area over, along, or within a shoreline or waterline of a public freshwater lake.”
11. The Commission serves as the ultimate authority with respect to disputes between riparian owners initiated under 312 IAC 11-1-3. *312 IAC 3-1-2; Indiana Code § 4-21.5-1-15.*
12. The Commission has jurisdiction over the subject matter of this proceeding and over the persons of the parties.

Findings of Fact:

13. The Claimants are the fee title owners of Lots 98 and 99 in Dallas Bay Phase I-B, which lots are not located adjacent to the shoreline of Dallas Lake. *Stipulated Exhibit 28.*
14. The Claimants also hold title to an easement lying adjacent to the shoreline of Dallas Lake described as follows:

An easement being five (5) feet in width, by parallel lines, off of the east side of Lot 4 in Brunner Park Range 9 East, LaGrange County Indiana. Said easement being for the exclusive benefit of the owner of lot number ninety-nine, in Dallas Bay Phase I-B Dallas Lake for ingress and egress (no motorized vehicles allowed), access to a water line now existing on said easement by grantors or their successors in interest who shall have responsibility for maintenance of their said water line. This agreement shall be construed as a covenant running with the land.

Id.

15. The Respondents own Lot 4 in Brunner Park subject to the Easement, which is described in title records associated with Lot 4 in Brunner Park as follows:

...an easement off the east side of said lot number four (4), five (5) feet in width, by parallel lines, for the exclusive benefit of the owner of lot number ninety-nine (99) in Dallas Bay Phase I-B Dallas Lake for ingress and egress (no motorized vehicles allowed), access to a water line now existing said easement by grantors or their successors in interest who shall have responsibility for maintenance of said water line. This agreement shall be construed as a covenant running with the land.

*Stipulated Exhibit 34.*¹

16. Testimony received indicates a limited degree of disagreement between the parties as to the exact location of the boundaries of the Easement landward of the shoreline; however, the location of the Easement is not in significant dispute.
17. The eastern boundary of Lot 4 in Brunner Park, which is also the eastern boundary of the Easement, is shared with the western boundary of Lot 3 in Brunner Park, which is owned by John Reed ("*Reed*"). *Testimony of Walter Holland.*
18. Prior to April 11, 1988, Lots 98 and 99 in Dallas Bay and Lot 4 in Brunner Park were all owned by Ralph R. Wilt and Doris M. Wilt (*collectively referred to as "the Wilts"*).
Stipulated Exhibit 30. On April 11, 1988, the Wilts sold Lot 4 in Brunner Park to Samuel J. Valentine, Jr. and Loretta J. Valentine (*collectively referred to as "the Valentines"*) reserving for their own use, as the current owner of Lot 99 in Dallas Bay, as well as for their successors in interest to Lot 99 in Dallas Bay, the interests specified in the Easement.
19. The Wilts continued their ownership of Lots 98 and 99 in Dallas Bay until December 20, 2004, when the property was conveyed to the D. Marilyn Wilt Revocable Trust. *Stipulated Exhibit 38.* The Claimants purchased Lots 98 and 99 in Dallas Bay by Trustee's Deed dated December 30, 2009. *Stipulated Exhibit 39.*
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21. Title to Lot 4 in Brunner Park was conveyed on numerous occasions after April 11, 1988 until the Respondents' purchase of the property on January 30, 2009. *Stipulated Exhibits 30-37.*
22. From October 2, 1989 until September 2, 1994, Lot 4 in Brunner Park was owned by Thomas L. Rofkahr and Stacy L. Rofkahr (*collectively referred to as "the Rofkahrs"*). *Testimony of Thomas L. Rofkahr, Stipulated Exhibits 31 & 32.*
23. A water line and associated electrical equipment necessary to provide irrigation water from Dallas Lake to Lots 98 and 99 in Dallas Bay is located on and lies beneath the surface of the Easement. *Testimony of Walter Holland, Stipulated Exhibits 4-6.* The existence of this

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infrastructure predates the Claimants' ownership of Lots 98 and 99 in Dallas Bay.²

Testimony of Walter Holland.

24. In May 2011 the Claimants extended a pier into Dallas Lake from the shoreline of the Easement and continued this activity seasonally until September 2013 when the Respondents demanded removal of the pier. *Testimony of Walter Holland, Stipulated Exhibit 25.*
25. The pier placed within Dallas Lake by the Claimants was approximately four feet wide by approximately twenty feet long. *Testimony of Walter Holland.* The pier generally appears to have been extended into Dallas Lake within a riparian zone established by extending landward property boundaries lakeward. *Stipulated Exhibit 19, Testimony of Walter Holland.*
26. With the permission of Reed, the Claimants placed their pier adjacent to the eastern most boundary of the Easement with their boatlift attached to the east side of the pier, which places the boat lift within the riparian zone associated with Lot 3 in Brunner Park.
Testimony of Walter Holland.
27. The shoreline of Dallas Lake in the vicinity of the shared boundary between the Lot 3 and Lot 4 of Brunner Park approximates a straight line and the boundary lines associated with Lot 4 intersect the shoreline in a general perpendicular fashion. *Stipulated Exhibits 13 – 16.*
28. The Claimant's pier being approximately four feet wide and situated adjacent to the eastern-most boundary of the Easement is approximately one foot from the boundary of the Easement located nearest to the Respondents.
29. The Claimants' extension of the pier from the Easement and use of the boatlift attached to the east side of that pier does not interfere with the Respondents use of their riparian rights.³
Testimony of Mark Phillips, Testimony of Lisa Meiners.
30. The Rofkahrs ownership of Lot 4 in Brunner Park between October 2, 1989 and September 2, 1994, correlated to the period the Wilts maintained ownership of Lots 98 and 99 of Dallas Bay. *Testimony of Thomas L. Rofkahr, Stipulated Exhibits 31 and 32.*
31. Thomas L. Rofkahr (*T. Rofkahr*) was a business associate of Ralph R. Wilt and had known the Wilts from approximately 1979. *Testimony of Rofkahr.* The Rofkahrs visited the Wilts at

² The Hollands made electrical repairs to the irrigation system in 2014 but there is no evidence to support a conclusion that the system was modified.

³ It is noted that portions of the evidence elicited at the administrative hearing reveal disputes having occurred between the Respondents and the Claimants with respect to activities occurring on the land associated with the Easement. These matters were considered but only as necessary to a determination of the parties' riparian interests, which is the matter primarily within the jurisdiction of the Commission.

the Wilt home on Lot 4 in Brunner Park before the Wilts sale of that property in 1988 to the Valentines and continued to visit the Wilts at their new home constructed on Lots 98 and 99 of Dallas Bay until that property was sold to the Hollands in 2009.

32. T. Rofkahr was the real estate agent who represented the Wilts in the sale of Lot 4 in Brunner Park to the Valentines in 1988, when the language establishing the Easement was drafted. *Id.* T. Rofkahr testified that during the 1988 sale Ralph R. Wilt stated to him that the Easement was necessary only for accessing and maintaining the irrigation infrastructure and was not needed for lake access because the Wilts owned other property abutting a channel by which they had access to Dallas Lake. *Id.*
33. The Wilts did not maintain a pier at the property abutting the channel during much of the time the Rofkahrs owned Lot 4 in Brunner Park except possibly near the end of that time. On later occasions T. Rofkahr observed the Wilts access Dallas Lake using their channel access. *Id.* T. Rofkahr did not recall that the Wilts maintained a pier when they resided on Lot 4 in Brunner Park.
34. On direct examination, T. Rofkahr's testimony appeared to convey that at no time from 1988, when Lot 4 in Brunner Park was sold to the Valentines, until the Wilts sold Lots 98 and 99 of Dallas Bay in 2009, did he observe the Wilts to use the Easement for the purpose of maintaining a pier or mooring a boat. However, on cross examination, T. Rofkahr acknowledged that in 1993, when he and his wife owned Lot 4 in Brunner Park, he assisted Ralph R. Wilt in extending a narrow wooden pier from the Easement. T. Rofkahr explained that the Wilts' daughter and her husband used the pier and occasionally moored a canoe at the pier extending from the Easement. *Id.* According to T. Rofkahr, the pier was only in place for one season before that pier was placed on the Wilts' channel lot.
35. The Rofkahrs did not give the Wilts "permission" to extend the pier from the Easement. T. Rofkahr stated "it was a friendship thing...we didn't question it."
36. T. Rofkahr assisted the Wilts in their seasonal installation of the pump for the irrigation system between 1989 and 1994 when he and his wife owned Lot 4 in Brunner Park. *Id.* T. Rofkahr explained that the pier extended from the Easement in 1993 also provided the ability to place the irrigation pump at a greater depth within Dallas Lake.
37. Since the Wilts were clearly able to install the irrigation system pump without aid of a pier every year except 1993 it can be reasonably concluded that the pier's primary purpose was

for providing recreational access to Dallas Lake along with a location for the Wilts' daughter and son-in-law to moor their canoe.

38. The Respondents and the Claimants agree that the Easement authorizes the Claimants' ingress and egress for the purpose of accessing and maintaining the water irrigation infrastructure that exists within the Easement and serves Lots 98 and 99 in Dallas Bay. However, the Respondents contend that this is the sole use to which the Claimants may put the Easement.
39. The Claimants interpret the Easement language to also grant them the right to extend a pier into Dallas Lake for recreational purposes, including the right to place a pier and moor boats.

Conclusions of Law:

40. The revelation that the Wilts extended a pier from the Easement, as testified to by T. Rofkahr, is inconsistent with testimony of Mark Phillips conveying a 2009 statement purportedly made by Ralph R. Wilt that the Easement was for the sole purpose of accessing the irrigation infrastructure. The placement of a pier from the Easement by the Wilts is also inconsistent with T. Rofkahr's description of Ralph R. Wilt's 1988 statement describing the intended purpose of the Easement. The statements of Ralph R. Wilt, as testified to by Mark Phillips and by T. Rofkahr, are hearsay to which the Claimants properly objected.
41. The hearsay evidence was properly admitted into evidence in the administrative hearing over the Claimants' objection. However, in light of the proper objection, the hearsay evidence that is uncorroborated by independent non-hearsay evidence may not form the basis of an order. *Indiana Code § 4-21.5-3-26*. The hearsay evidence associated with the purported statements of Ralph R. Wilt in 1988 and 2009 as testified to by T. Rofkahr and Mark Phillips, respectively, are not supported by independent non-hearsay evidence. In fact, the only non-hearsay evidence associated with the past use of the Easement is in direct contradiction to the hearsay statements. The hearsay evidence cannot, in this circumstance support an order.
42. The term "riparian rights" refers to:
- a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. These rights are significantly different from each other in many respects, and yet they share a common name just as riparian landowners attempt to share the common benefits that arise from adjacency to defined bodies of water. This bundle includes at least the following rights:
 - i. of access to the water;

- ii. to build a wharf or pier into the water;
- iii. to use the water without transforming it;
- iv. to consume the water;
- v. to accretions (alluvium); and
- vi. to own the subsoil of nonnavigable streams and other 'private' waters.

1 WATER AND WATER RIGHTS § 6.01(a)(4), Third Edition, 2013.

43. Riparian rights are enjoyed by the owner of lands lying adjacent to the waters who also possess the corresponding right to protect against the unreasonable use of the waters by others. *Spaw v. Ashley*, 12 CADDNAR 233, (2010) citing *Baughn v. Town of Culver and DNR*, 11 CADDNAR 261, (2008).
44. The State of Indiana, through the Department possesses "full power and control of all of the public freshwater lakes in Indiana" and "holds and controls all public freshwater lakes in trust for the use of all the citizens of Indiana for recreation." *Indiana Code § 14-26-2-5(d)*. Under this regulatory scheme "a person owning land bordering a public freshwater lake does not have the exclusive right to the use of the waters of the lake or any part of the lake." *Indiana Code § 14-26-2-5(e)*. While riparian owners "continue to possess their rights with respect to a public freshwater lake... their rights are now statutory and must be balanced with the public's rights." *Lake of the Woods v. Ralston*, 748 NE 2d 396, 401 (Ind.Ct.App. 2001).
45. As the owners of Lot 4 in Brunner Park, the Respondents are the owners of the riparian rights associated with the correlating shoreline of Dallas Lake.
46. The Claimants, who are not owners of land bordering Dallas Lake, acknowledge they are not riparian owners. However, the Claimants maintain that as the owners of the Easement they hold the right to use the riparian rights associated with the servient estate in issue, the five foot strip off the east side of Lot 4 in Brunner Park. *Koltz v. Horn*, 558 N.E.2d 1096, (1990).
47. A determination of parties' rights with respect to riparian easements must consider:
- Easements burdening land with riparian rights attached do not necessarily provide the easement holder use of these riparian rights. *Brown v. Heidersbach*, 172 Ind. App. 434, 441, 360 N.E.2d 614, 619-620 (1977). Instead, we first look to the express language of the easement. *Klotz v. Horn*, 558 N.E.2d 1096, 1097-1098 (Ind. 1990). 'An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from an examination of all its material parts.' *Brown*, 172 Ind. App. at 441, 360 N.E.2d at 620. Courts may resort to extrinsic evidence to ascertain the intent of the grantors creating the easement only where the language establishing the easement is ambiguous. *Gunderson v. Rondenelli*, 677 N.E.2d 601, 603 (Ind.Ct.App. 1997), (citing *Klotz*, 558 N.E.2d at 1098). A deed is ambiguous if it

is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. See *Abbey Villas Dev. Corp. v. Site Contactors, Inc.*, 716 N.E.2d 91, 100 (Ind.Ct.App. 1999) *trans denied*.

Spaw, supra at 241, citing *Parkinson v. McCue*, 831 N.E.2d 118, 128, (Ind.Ct.App. 2005).

48. “An ambiguity does not exist simply because a controversy exists between the parties, with each favoring a different interpretation.” *Stevenson v. Hamilton Mut. Ins. Co.*, 672 NE 2d 467, (Ind.Ct.App. 1996) citing *Harden v. Monroe Guaranty Insurance Company*, 626 N.E.2d 814, 817 (Ind.Ct.App.1993), *trans. denied*. However, in the case that “reasonably intelligent persons would honestly differ as to its meaning” the instrument creating the Easement must be deemed ambiguous. *Abbey Villas*, 716 N.E.2d at 100.
49. Portions of the Easement are clearly unambiguous. Without doubt the location of the Easement is to be five (5) feet in width running along the east side of Lot 4 in Brunner Park with the western boundary of the Easement being formed by a line running parallel to the eastern-most boundary of the lot. The Easement clearly is intended for the sole benefit of the owner of Lot 99 Dallas Bay Phase I-B Dallas Lake, prohibits the use of motorized vehicles and is required to be construed as a covenant running with the land. The Easement certainly grants to the holder the right to access the irrigation system and places upon the holder of the Easement the responsibility to maintain that system.
50. The Respondents highlight the fact that the instrument creating the Easement fails to reference Dallas Lake, the shoreline or make any other reference to the water’s edge in support of an erroneous conclusion that “no riparian rights were conferred” by the instrument. *Respondents’/Counterclaimants’ Post Trial Brief*, § III. A. However, the Respondents simultaneously acknowledge that the instrument grants to the Claimants the right to access and maintain the irrigation system. *Id.* Logically, for the irrigation system to be of use it must access the waters of Dallas Lake.
51. Ownership of the Easement does, without doubt, confer upon the Claimants certain riparian rights associated with the use and consumption of the water but whether the rights conferred were intended to include ingress and egress for additional purposes is less clearly expressed by the instrument.
52. The language of interest is the reference to the purpose of the Easement being “for ingress and egress (no motorized vehicles allowed), access to a water line now existing on said easement....”, which is not artfully drafted.

53. The Claimants interpret the Easement's language as conveying a right of ingress and egress separate and apart from the right to access the existing water line and seek the Commission's consideration of parole evidence to ascertain the intent of the grantor.
54. The Respondents maintain that the language of the Easement unambiguously grants a limited right of ingress and egress for use, as necessary, in accessing and maintaining the existing water line and content that consideration of parole evidence is not appropriate.
55. The language of the Easement is unambiguous.
56. The Easement grants to the Claimants the right of ingress and egress to Dallas Lake for the limited purpose of accessing and maintaining the existing irrigation system and nothing more.
57. To concur with the Respondents' position would require the inference that the grantor mistakenly included the use of a comma while omitting a conjunctive word, such as the word "for" before the word "access" creating instead a phrase that reads "for ingress and egress (no motorized vehicles allowed) for access to a water line now existing on said easement..." However, this is not the language of the instrument.
58. The express language of the instrument creating the Easement could equally be inferred to include the word "and" in place of the comma by which the phrase would read "for ingress and egress (no motorized vehicles allowed) and access to a water line now existing on said easement..." Again, this is not the language of the instrument.
59. It is simply unclear whether the language following the comma was intended as a limitation upon the previous, expressed grant of general ingress and egress or whether that language was intended to emphasize one specific inclusion within the general grant of ingress and egress.
60. It is concluded that the express language of the instrument creating the Easement is ambiguous.
61. The Easement in question is an easement of reservation by which the grantor, who through the creation of the Easement reserved rights for his own benefit. Therefore the use made of the Easement by the grantor, in this case the Wilts, is of particular significance.
62. The Wilts utilized the Easement for the placement of a pier.
63. The Commission adopted "Riparian Zones within Public Freshwater Lakes and Navigable Waters" for the purpose of "[providing] guidance for determining the boundaries of riparian

zones within public freshwater lakes and within navigable waters.” *Information Bulletin # 56 (Second Amendment)*, <http://www.in.gov/legislative/iae/20100331-IR-312100175NRA.xml.pdf> (“*Information Bulletin 56*”). Within this document the “*Second Principle*”, which specifies that in situations where the “shore approximates a straight line, and where the onshore property boundaries are approximately perpendicular to this line, the boundaries of riparian zones are determined by extending the onshore boundaries into the public waters.”

64. The evidence supports the conclusion that the Second Principle of “*Riparian Zones within Public Freshwater Lakes and Navigable Waters*” shall be utilized to determine the boundaries of the riparian zone associated with Lot 4 in Brunner Park and the boundaries of the riparian zone associated with the Easement.

Final Order:

65. The Easement is determined to confer upon the owner of Lot 99 in Dallas Bay Phase I-B, presently the Claimants, limited rights of ingress and egress necessary to limited riparian rights associated with accessing and consuming waters obtained from Dallas Lake through use of the irrigation system existing within the Easement.

66. Riparian rights were not conveyed to the Claimants, or any future owner of Lot 99 in Dallas Bay Phase I-BT, beyond those described in Finding 65.

67. The boundary of the riparian zone associated with the eastern-most boundary of Lot 4 in Brunner Park, which also forms the eastern-most boundary of the Easement, and the western-most boundary of the Easement shall be determined utilizing the Second Principle set forth in *Information Bulletin 56*. The Second Principle requires the terrestrial property lines to be extended into Dallas Lake.

68. It is recognized that a survey may be required for identification of the exact riparian zone boundaries.

69. The modest dimensions of the riparian zone associated with the Easement will necessarily impose limitations upon its use. Any pier, as well as boats moored to the pier or any other lateral extensions, placed within the riparian zone associated with the Easement must remain fully within the confines of the riparian zone unless permission is obtained from an adjacent riparian owner authorizing an encroachment.

~~70. The exercise of riparian rights by the parties to this proceeding is subject to the Department's~~
~~reasonable regulation.~~

Dated: _____, 2015

Jane Ann Stautz
Chair, AOPA Committee
Natural Resources Commission

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

WALTER HOLLAND and)	
KATHLEEN HOLLAND,)	ADMINISTRATIVE CAUSE
Petitioners,)	NUMBER: 14-056W
)	
vs.)	
)	
MARK PHILLIPS, SARA PHILLIPS,)	(Riparian Rights Dispute)
and LISA MENIERS,)	
Respondents,)	
)	
)	
and)	
)	
DEPARTMENT OF NATURAL RESOURCES,)	
Agency Respondent.)	

MARK PHILLIPS, SARA PHILLIPS,)
and LISA MENIERS,)
Counterclaim Petitioners,)
)
vs.)
)
WALTER HOLLAND and)
KATHLEEN HOLLAND,)
Counterclaim Respondents)
)
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)
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**FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH FINAL ORDER**

Procedural Background and Jurisdiction:

1. For consideration is the Petition for Administrative Review filed with the Natural Resources Commission's Division of Hearings ("*Commission*") by the Claimants, Walter Holland and

Kathleen S. Holland, (*collectively referred to as "the Claimants"*) on March 17, 2014 seeking resolution of a dispute "concerning the location of their pier on an easement owned by them" that fronts on Dallas Lake, located in LaGrange County, Indiana.

2. The dispute arose as a result of a demand made by the Respondent's, Mark Phillips, Sara Phillips and Lisa Meiners (*collectively referred to as "the Respondents"*), that the Claimants remove their pier as well as any boat lift or boat moored to the pier.
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infrastructure predates the Claimants' ownership of Lots 98 and 99 in Dallas Bay.²

Testimony of Walter Holland.

24. In May 2011 the Claimants extended a pier into Dallas Lake from the shoreline of the Easement and continued this activity seasonally until September 2013 when the Respondents demanded removal of the pier. *Testimony of Walter Holland, Stipulated Exhibit 25.*

25. The pier placed within Dallas Lake by the Claimants was approximately four feet wide by approximately twenty feet long. *Testimony of Walter Holland.* The pier generally appears to have been extended into Dallas Lake within a riparian zone established by extending landward property boundaries lakeward. *Stipulated Exhibit 19, Testimony of Walter Holland.*

26. With the permission of Reed, the Claimants placed their pier adjacent to the eastern most boundary of the Easement with their boatlift attached to the east side of the pier, which places the boat lift within the riparian zone associated with Lot 3 in Brunner Park.

Testimony of Walter Holland.

27. The shoreline of Dallas Lake in the vicinity of the shared boundary between the Lot 3 and Lot 4 of Brunner Park approximates a straight line and the boundary lines associated with Lot 4 intersect the shoreline in a general perpendicular fashion. *Stipulated Exhibits 13 – 16.*

28. The Claimant's pier being approximately four feet wide and situated adjacent to the eastern-most boundary of the Easement is approximately one foot from the boundary of the Easement located nearest to the Respondents.

29. The Claimants' extension of the pier from the Easement and use of the boatlift attached to the east side of that pier does not interfere with the Respondents use of their riparian rights.³

Testimony of Mark Phillips, Testimony of Lisa Meiners.

30. The Rofkahrs ownership of Lot 4 in Brunner Park between October 2, 1989 and September 2, 1994, correlated to the period the Wilts maintained ownership of Lots 98 and 99 of Dallas Bay. *Testimony of Thomas L. Rofkahr, Stipulated Exhibits 31 and 32.*

31. Thomas L. Rofkahr (*T. Rofkahr*) was a business associate of Ralph R. Wilt and had known the Wilts from approximately 1979. *Testimony of Rofkahr.* The Rofkahrs visited the Wilts at

² The Hollands made electrical repairs to the irrigation system in 2014 but there is no evidence to support a conclusion that the system was modified.

³ It is noted that portions of the evidence elicited at the administrative hearing reveal disputes having occurred between the Respondents and the Claimants with respect to activities occurring on the land associated with the Easement. These matters were considered but only as necessary to a determination of the parties' riparian interests, which is the matter primarily within the jurisdiction of the Commission.

the Wilt home on Lot 4 in Brunner Park before the Wilts sale of that property in 1988 to the Valentines and continued to visit the Wilts at their new home constructed on Lots 98 and 99 of Dallas Bay until that property was sold to the Hollands in 2009.

32. T. Rofkahr was the real estate agent who represented the Wilts in the sale of Lot 4 in Brunner Park to the Valentines in 1988, when the language establishing the Easement was drafted. *Id.* T. Rofkahr testified that during the 1988 sale Ralph R. Wilt stated to him that the Easement was necessary only for accessing and maintaining the irrigation infrastructure and was not needed for lake access because the Wilts owned other property abutting a channel by which they had access to Dallas Lake. *Id.*
33. The Wilts did not maintain a pier at the property abutting the channel during much of the time the Rofkahrs owned Lot 4 in Brunner Park except possibly near the end of that time. On later occasions T. Rofkahr observed the Wilts access Dallas Lake using their channel access. *Id.* T. Rofkahr did not recall that the Wilts maintained a pier when they resided on Lot 4 in Brunner Park.
34. On direct examination, T. Rofkahr's testimony appeared to convey that at no time from 1988, when Lot 4 in Brunner Park was sold to the Valentines, until the Wilts sold Lots 98 and 99 of Dallas Bay in 2009, did he observe the Wilts to use the Easement for the purpose of maintaining a pier or mooring a boat. However, on cross examination, T. Rofkahr acknowledged that in 1993, when he and his wife owned Lot 4 in Brunner Park, he assisted Ralph R. Wilt in extending a narrow wooden pier from the Easement. T. Rofkahr explained that the Wilts' daughter and her husband used the pier and occasionally moored a canoe at the pier extending from the Easement. *Id.* According to T. Rofkahr, the pier was only in place for one season before that pier was placed on the Wilts' channel lot.
35. The Rofkahrs did not give the Wilts "permission" to extend the pier from the Easement. T. Rofkahr stated "it was a friendship thing...we didn't question it."
36. T. Rofkahr assisted the Wilts in their seasonal installation of the pump for the irrigation system between 1989 and 1994 when he and his wife owned Lot 4 in Brunner Park. *Id.* T. Rofkahr explained that the pier extended from the Easement in 1993 also provided the ability to place the irrigation pump at a greater depth within Dallas Lake.
37. Since the Wilts were clearly able to install the irrigation system pump without aid of a pier every year except 1993 it can be reasonably concluded that the pier's primary purpose was

for providing recreational access to Dallas Lake along with a location for the Wilts' daughter and son-in-law to moor their canoe.

38. The Respondents and the Claimants agree that the Easement authorizes the Claimants' ingress and egress for the purpose of accessing and maintaining the water irrigation infrastructure that exists within the Easement and serves Lots 98 and 99 in Dallas Bay. However, the Respondents contend that this is the sole use to which the Claimants may put the Easement.
39. The Claimants interpret the Easement language to also grant them the right to extend a pier into Dallas Lake for recreational purposes, including the right to place a pier and moor boats.

Conclusions of Law:

40. The revelation that the Wilts extended a pier from the Easement, as testified to by T. Rofkahr, is inconsistent with testimony of Mark Phillips conveying a 2009 statement purportedly made by Ralph R. Wilt that the Easement was for the sole purpose of accessing the irrigation infrastructure. The placement of a pier from the Easement by the Wilts is also inconsistent with T. Rofkahr's description of Ralph R. Wilt's 1988 statement describing the intended purpose of the Easement. The statements of Ralph R. Wilt, as testified to by Mark Phillips and by T. Rofkahr, are hearsay to which the Claimants properly objected.
41. The hearsay evidence was properly admitted into evidence in the administrative hearing over the Claimants' objection. However, in light of the proper objection, the hearsay evidence that is uncorroborated by independent non-hearsay evidence may not form the basis of an order. *Indiana Code § 4-21.5-3-26*. The hearsay evidence associated with the purported statements of Ralph R. Wilt in 1988 and 2009 as testified to by T. Rofkahr and Mark Phillips, respectively, are not supported by independent non-hearsay evidence. In fact, the only non-hearsay evidence associated with the past use of the Easement is in direct contradiction to the hearsay statements. The hearsay evidence cannot, in this circumstance support an order.
42. The term "riparian rights" refers to:
- a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. These rights are significantly different from each other in many respects, and yet they share a common name just as riparian landowners attempt to share the common benefits that arise from adjacency to defined bodies of water. This bundle includes at least the following rights:
 - i. of access to the water;

- ii. to build a wharf or pier into the water;
- iii. to use the water without transforming it;
- iv. to consume the water;
- v. to accretions (alluvium); and
- vi. to own the subsoil of nonnavigable streams and other 'private' waters.

I WATER AND WATER RIGHTS § 6.01(a)(4), Third Edition, 2013.

43. Riparian rights are enjoyed by the owner of lands lying adjacent to the waters who also possess the corresponding right to protect against the unreasonable use of the waters by others. *Spaw v. Ashley*, 12 CADDNAR 233, (2010) citing *Baughn v. Town of Culver and DNR*, 11 CADDNAR 261, (2008).
44. The State of Indiana, through the Department possesses "full power and control of all of the public freshwater lakes in Indiana" and "holds and controls all public freshwater lakes in trust for the use of all the citizens of Indiana for recreation." *Indiana Code § 14-26-2-5(d)*. Under this regulatory scheme "a person owning land bordering a public freshwater lake does not have the exclusive right to the use of the waters of the lake or any part of the lake." *Indiana Code § 14-26-2-5(e)*. While riparian owners "continue to possess their rights with respect to a public freshwater lake... their rights are now statutory and must be balanced with the public's rights." *Lake of the Woods v. Ralston*, 748 NE 2d 396, 401 (Ind.Ct.App. 2001).
45. As the owners of Lot 4 in Brunner Park, the Respondents are the owners of the riparian rights associated with the correlating shoreline of Dallas Lake.
46. The Claimants, who are not owners of land bordering Dallas Lake, acknowledge they are not riparian owners. However, the Claimants maintain that as the owners of the Easement they hold the right to use the riparian rights associated with the servient estate in issue, the five foot strip off the east side of Lot 4 in Brunner Park. *Koltz v. Horn*, 558 N.E.2d 1096, (1990).
47. A determination of parties' rights with respect to riparian easements must consider:
 Easements burdening land with riparian rights attached do not necessarily provide the easement holder use of these riparian rights. *Brown v. Heidersbach*, 172 Ind. App. 434, 441, 360 N.E.2d 614, 619-620 (1977). Instead, we first look to the express language of the easement. *Klotz v. Horn*, 558 N.E.2d 1096, 1097-1098 (Ind. 1990). 'An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from an examination of all its material parts.' *Brown*, 172 Ind. App. at 441, 360 N.E.2d at 620. Courts may resort to extrinsic evidence to ascertain the intent of the grantors creating the easement only where the language establishing the easement is ambiguous. *Gunderson v. Rondenelli*, 677 N.E.2d 601, 603 (Ind.Ct.App. 1997), (citing *Klotz*, 558 N.E.2d at 1098). A deed is ambiguous if it

is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. See *Abbey Villas Dev. Corp. v. Site Contactors, Inc.*, 716 N.E.2d 91, 100 (Ind.Ct.App. 1999) *trans denied*.

Spaw, supra at 241, citing *Parkinson v. McCue*, 831 N.E.2d 118, 128, (Ind.Ct.App. 2005).

48. “An ambiguity does not exist simply because a controversy exists between the parties, with each favoring a different interpretation.” *Stevenson v. Hamilton Mut. Ins. Co.*, 672 NE 2d 467, (Ind.Ct.App. 1996) citing *Harden v. Monroe Guaranty Insurance Company*, 626 N.E.2d 814, 817 (Ind.Ct.App.1993), *trans. denied*. However, in the case that “reasonably intelligent persons would honestly differ as to its meaning” the instrument creating the Easement must be deemed ambiguous. *Abbey Villas*, 716 N.E.2d at 100.
49. Portions of the Easement are clearly unambiguous. Without doubt the location of the Easement is to be five (5) feet in width running along the east side of Lot 4 in Brunner Park with the western boundary of the Easement being formed by a line running parallel to the eastern-most boundary of the lot. The Easement clearly is intended for the sole benefit of the owner of Lot 99 Dallas Bay Phase I-B Dallas Lake, prohibits the use of motorized vehicles and is required to be construed as a covenant running with the land. The Easement certainly grants to the holder the right to access the irrigation system and places upon the holder of the Easement the responsibility to maintain that system.
50. The Respondents highlight the fact that the instrument creating the Easement fails to reference Dallas Lake, the shoreline or make any other reference to the water’s edge in support of an erroneous conclusion that “no riparian rights were conferred” by the instrument. *Respondents’/Counterclaimants’ Post Trial Brief*, § III. A. However, the Respondents simultaneously acknowledge that the instrument grants to the Claimants the right to access and maintain the irrigation system. *Id.* Logically, for the irrigation system to be of use it must access the waters of Dallas Lake.
51. Ownership of the Easement does, without doubt, confer upon the Claimants certain riparian rights associated with the use and consumption of the water but whether the rights conferred were intended to include ingress and egress for additional purposes is less clearly expressed by the instrument.
52. The language of interest is the reference to the purpose of the Easement being “for ingress and egress (no motorized vehicles allowed), access to a water line now existing on said easement....”, which is not artfully drafted.

53. The Claimants interpret the Easement's language as conveying a right of ingress and egress separate and apart from the right to access the existing water line and seek the Commission's consideration of parole evidence to ascertain the intent of the grantor.
54. The Respondents maintain that the language of the Easement unambiguously grants a limited right of ingress and egress for use, as necessary, in accessing and maintaining the existing water line and content that consideration of parole evidence is not appropriate.
55. The language of the Easement is unambiguous.
56. The Easement grants to the Claimants the right of ingress and egress to Dallas Lake for the limited purpose of accessing and maintaining the existing irrigation system and nothing more.

Final Order:

57. The Easement is determined to confer upon the owner of Lot 99 in Dallas Bay Phase I-B, presently the Claimants, limited rights of ingress and egress necessary to limited riparian rights associated with accessing and consuming waters obtained from Dallas Lake through use of the irrigation system existing within the Easement.
58. Riparian rights were not conveyed to the Claimants, or any future owner of Lot 99 in Dallas Bay Phase I-BT, beyond those described in Finding 65.

Dated: _____, 2015

Jane Ann Stautz
Chair, AOPA Committee
Natural Resources Commission